

U.S. Department of Labor

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Issue Date: 19 October 2006

CASE NO.: 2005-LHC-2260

OWCP NO.: 07-173461

IN THE MATTER OF

W.S.¹,

Claimant

v.

MASSE CONTRACTING INC.,

Employer

and

THE GRAY INSURANCE COMPANY,

Carrier

APPEARANCES:

ISAAC H. SOILEAU, JR., ESQ.

On behalf of Claimant

COLLINS C. ROSSI, ESQ.

On behalf of Employer/Carrier

BEFORE: C. RICHARD AVERY

Administrative Law Judge

¹ Pursuant to a policy decision of the Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet.

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Claimant against Masse Contracting, Inc. (Employer), and The Gray Insurance Company (Carrier). The formal hearing was conducted in Covington, Louisiana on July 26, 2006. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.² The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-17 and 19-30, and Employer's Exhibits 1-6 and 8-16. This decision is based on the entire record.³

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The date of alleged injury/accident is February 15, 2005; aggravated on March 21, 2005.
2. The original injury occurred in the course and scope of employment.
3. An employer/employee relationship existed at the time of the alleged accident.
4. Employer was advised of the injury on February 15, 2005.
5. Notice of Controversion was filed May 4, 2005.
6. An informal conference was held May 24, 2005.
7. The average weekly wage at the time of injury is disputed.

Issues

The unresolved issues in this proceeding are:

1. Average Weekly Wage.
2. Nature and Extent of Disability.
3. Causation of Claimant's headaches.

² The parties were granted time post hearing to file briefs.

³ The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. ____"; Joint Exhibit- "JX __, pg.____"; Employer's Exhibit- "EX __, pg.____"; and Claimant's Exhibit- "CX __, pg.____".

4. Payment of benefits (including TTD, medical, mileage, and reimbursement to Claimant or his health insurance.)
5. Choice of physician and entitlement to ongoing medical benefits or surgery.
6. Penalties, Interest and Attorney's Fees.

Statement of the Evidence

Claimant:

Claimant was born November 3, 1967 and completed the ninth grade. He currently lives in Golden Meadow, Louisiana. He has worked as a trawler and welder most of his life. Over the past three years, Claimant has primarily done welding work and is certified as a welder by Bollinger. Claimant has worked mainly in the Bollinger shipyard in Larose, Louisiana. He has worked for Bollinger and for other employers, but has always remained in that shipyard. Claimant worked for Employer for about five or six months and was working for them on February 15, 2005, the date of his accident.

From about 2000 to 2003 Claimant worked for Bollinger. He started out making \$19.75 an hour and after 40 hours, he would make time and a half. In 2003 Claimant went to work for Joe's Septic Tank (Boudreaux's) and earned \$22.00 an hour. After Boudreaux's, Claimant went to work for Employer and was making \$22.00 an hour. His hours per week would vary depending on the boat he was working on, however, no one was allowed to work more than 12 hours a day. Claimant's superintendent kept a log of hours worked.

Claimant's counsel referenced CX-27, 28 and 29. Claimant identified CX-27 as copies of his paycheck stubs from his work with Bollinger in 2003. CX-28 was a book that Claimant was told to purchase in order to log his hours worked. The superintendent would then sign off on the log daily to allow Claimant to be paid. Claimant stated that the invoices from Bollinger ended on December 10, 2003. Claimant had switched employers and began working for Boudreaux's. The next invoice as evidenced in CX-28, began on December 22, 2003. Claimant explained that some invoices represented a days worth of work and some represented a weeks worth of work. CX-29 was identified as a work log that Claimant kept for Employer. His first day of work, as shown in the log, is November 15, 2004. Claimant was available to work full-time; however, since it was close to the holidays, the work was not as regular as usual. Claimant testified that his checks were direct deposited and his wife handled the finances.

Regarding the February 15, 2005 accident, Claimant testified that he was working in the engine room putting shafts back in the boat. This requires two individuals to work together turning the shaft. The chain tongue used to turn the shaft was in a bind and Claimant was holding it while the other worker let some slack out. Claimant undid the hook and when the other worker pulled the chain it broke and the bar hit Claimant in the chest. The force of the blow threw Claimant to the bottom of the boat and he was dazed. Claimant did have a hardhat on while he was working, but it fell off when he was knocked over. When Claimant fell, he hit the back of his head and the back of his shoulders the hardest. He was knocked back at least 10 feet. The hook that hit Claimant weighed between 80 to 85 pounds.

After being knocked down, Claimant remained in the bottom of the boat for a little while. He did not immediately seek medical aid because he was not sure if the injury would go away. Claimant stated his pain increased, beginning with his chest that started swelling and making it hard for Claimant to breath. His chest was also starting to bruise. Claimant stayed at the yard until 11:00, although he testified that he did not really work. Claimant's superintendent told him he should go get his injury looked at and Claimant left work. He went to see Dr. Troy Hutchinson (he wanted to see Dr. Smith but he was not available).

Dr. Hutchinson took x-rays of Claimant's chest which did not reveal any fractures. Claimant was instructed to take it easy and rest. He contacted Employer and was told to go see Dr. Sweeney in Houma. About a week after the accident, Claimant went to Dr. Sweeney's office for a check up, but he was seen by a different doctor.⁴ Claimant next went to Dr. Roger Blanchard, another doctor recommended by Employer. Dr. Blanchard noticed a bump on Claimant's head and told him to stay off work for a while.

About five or six weeks after the accident Claimant attempted to go back to work, with Dr. Blanchard's approval. However, Claimant could not keep the hardhat on his head because it was hurting him and therefore, he could not do his job. The next morning Claimant woke up with his feet swollen. He called Employer and was told to return to Dr. Blanchard. Dr. Blanchard gave Claimant a shot for the swelling and pain and told Claimant to come back the following day.

⁴ Claimant went to Dr. Sweeney's office twice. On the one occasion when Claimant was seen by Dr. Sweeney, Dr. Sweeney did not physically examine Claimant or ask Claimant to perform any movements or tests. This visit was paid for by Employer. Claimant was told he had to pass a drug test before he could get treatment; he paid for a drug test himself and passed it.

Claimant testified that when he returned the next day, Dr. Blanchard informed him that Employer was not allowing any further treatment. Claimant then went to Dr. Smith, his family physician. Dr. Smith took x-rays and referred Claimant to an orthopedic. Claimant looked in the phone book and made an appointment with Dr. Charles Murphy at The Orthopedic Center in Metairie, Louisiana. Claimant stated that he went to a doctor in Metairie instead of Houma, Louisiana because it was about the same distance for him and because he had been told, through a letter from the labor board, that he could see a physician of his choice.

Claimant stated that Dr. Murphy examined him and performed various tests resulting in a recommendation of surgery for Claimant. Claimant asked if there was another option and Dr. Murphy suggested that Claimant try injections and referred him to Amy Phelan. Claimant received an initial injection in his neck which helped at first and reduced some of the pain. When the pain started to come back, Claimant returned to Dr. Phelan and received a second injection in his head. Claimant testified that the second injection was less effective than the first one. Dr. Phelan continued treating Claimant for a while, but stopped in January 2006.⁵

Claimant complained of headaches to both to Dr. Smith and Dr. Phelan. He stated that he was told that the headaches were connected to his neck problem. Claimant testified that he suffered from headaches since his accident but did not have these symptoms prior to the accident. Nor did Claimant have any trouble with his neck, arm or shoulder prior to the 2005 accident.⁶

Dr. Phelan referred Claimant to Dr. Terrence D'Souza to evaluate his headaches. Claimant saw Dr. D'Souza about two Fridays prior to the hearing. Dr. D'Souza told Claimant that he believed the headaches were related to nerves in Claimant's neck. Therefore, two days prior to the hearing, Dr. D'Souza conducted a nerve test on Claimant. At the time of trial, Claimant was scheduled to return to Dr. D'Souza to get the results of this test.

Claimant stated that Employer has not paid for all of his medical treatment. Claimant has health insurance and he is paying the deductibles and paying for his

⁵ According to Claimant, Dr. Phelan told him that he needed a surgeon to treat him. Thus, Claimant returned to Dr. Murphy who recommended Dr. Lucien Miranne. Dr. Miranne wants to have additional diagnostic testing done on Claimant. At the time of trial, this testing had not been approved by Employer. Claimant testified that Dr. Miranne was his choice of physician and choice of surgeon.

⁶ On cross-examination Claimant was reminded that he did injure his shoulder in an automobile accident about 10 years earlier. However, on re-direct Claimant testified that he was working full-time pain free prior to the February 15, 2005 accident.

own prescriptions. Although Employer gave Claimant a prescription card, Employer never activated it. Employer did pay mileage initially, but then stopped.

As of the time of the trial, Claimant stated that his left arm was still giving him trouble, his head was always hurting and his neck was hurting. Claimant stated that he did not feel capable of returning to work in his present condition. He would not be able to do what would be required of him. Claimant testified that Employer did not have light duty work available, that he was aware of.

Claimant's counsel again questioned Claimant regarding the "time/pay book" Claimant used during his employment with Employer. Counsel presented the book to Claimant, who identified it as such. Claimant stated that in order to get paid, everyday he would fill out a page in the book with his hours worked and give it to Employer to sign. Employer kept a copy, Claimant kept a copy and Bollinger kept a copy.

Cross-Examination

On cross-examination Claimant stated that his wife made requests for reimbursement to Employer. He identified two handwritten notes, from April 19, 2005 and April 26, 2005, to Keith Bowman at Gray Insurance requesting mileage reimbursement.

Employer's counsel presented CX-1 to Claimant, which was the accident investigation report from February 15, 2005. Claimant did not know why the accident report stated that he left work at 11:00 for reasons unrelated to his accident.⁷

Claimant was next questioned regarding a January 2006 visit to Our Lady of the Sea Hospital for a condition unrelated to his 2005 accident. The Patient Information Form was presented to Claimant which, under employer, listed Claimant as a self-employed commercial fisherman. Claimant stated that he did not write that, but that he had been to the hospital previously and they may have known that he had a trawl boat.

Following his accident with Employer, Claimant was in an automobile accident in January 2006. He saw Dr. Smith regarding injuries from that accident.

⁷ On re-direct Claimant was presented with the accident investigation report and upon review, he stated that he did not sign the report – his signature was typed. Claimant also testified that he never told anyone that he was leaving the shipyard for his own purposes.

Claimant stated that neither his neck nor shoulder injury were affected by the car accident. Claimant further testified that if Dr. Smith stated that following Claimant's accident, his neck pain was increased by driving, that that would be wrong. Besides the car accident, Claimant stated that he has not had any other injuries since he left Employer's. Claimant stated that if Dr. Smith testified that Claimant had hurt himself moving furniture in January 2006 Dr. Smith would be wrong.

Claimant attempted to go trawling on one occasion following his accident; however, he got a bad headache, blacked-out and has not attempted to go trawling again.⁸ On re-direct Claimant stated that he consider himself a welder and a commercial fisherman. However, for the past couple of years Claimant had hired someone to run his boat and he had worked mostly in the shipyards.

Claimant acknowledged that following his accident he had to go to the hospital because he overdosed on some of the medication he was being prescribed. He was being prescribed medicine by both Dr. Phelan and Dr. Smith. Following the incident, he talked to Dr. Smith about the problem and they decided that Claimant would only take medicine prescribed by Dr. Smith.

Claimant's Wife (CW):

CW testified at the hearing on July 26, 2006. She stated that Claimant and she have been married nine years and that she primarily took care of the finances. CW also accompanied Claimant to all of his medical visits following his accident in February 2005. CW wanted to attend all of the appointments so that she could hear what was going on. CW stated that she and Claimant have had to pay for many of these medical visits, diagnostic tests and prescriptions. She verified that CX-25 and CX-26 were estimates of what they have had to pay for Claimant's medical care. Some of the bills were paid by Claimant and CW and some were paid by Claimant's medical insurance, Blue Cross Blue Shield. Blue Cross has contacted CW about getting reimbursed for their payments.

CW testified that CX-16 was also a list of medical bills that have either been paid or need to be paid. CX-24 contained mileage tickets that CW had submitted to the claims adjuster, Keith Brown. CW had received a letter from the labor board stating that Claimant was entitled to mileage reimbursement, so she called

⁸ Prior to taking his boat out, Claimant asked Dr. Phelan if it would be ok and she told him yes but placed a five pound weight restriction on Claimant and told him he could only drive the boat. Before the accident Claimant worked the trawl boat by himself.

Employer and was told to contact Mr. Bowman. CW received one check initially, for about \$191.00, and then was told by Mr. Bowman that mileage was being disputed and would not be paid. Later, she was sent an additional check for \$30.30.

CW stated that one of the issues causing them not to get mileage reimbursed was the fact that they were seeing Dr. Murphy in New Orleans and not Dr. Sweeney. CW stated that in her estimate, round trip to Houma (to see Dr. Sweeney) was approximately 140 miles, where round trip to New Orleans (to see Dr. Murphy) was approximately 160 miles.

CW identified CX-23 as a summary of how much she and Claimant have received in indemnity from Masse or its Carrier.

CW testified that she lives in the same house as her husband and has since the accident on February 15, 2005. Prior to the accident Claimant was working everyday, but since the accident he has not worked. She also explained that Claimant's mood and physical capabilities had changed since the accident. She stated that if Claimant concentrates too hard he gets headaches and his arm will involuntarily move/jump. Claimant cannot turn his neck but has to turn his whole body. When the headaches come on, Claimant sometimes has to lie still for days at a time to avoid being nauseous and throwing up.

Carla Seyler, Vocational Rehabilitation Counselor:

Ms. Seyler testified at the hearing as an expert in vocational rehabilitation. Ms. Seyler was asked by Employer to conduct a vocational rehabilitation evaluation of Claimant. Ms. Seyler contacted Claimant's attorney in order to set up a meeting with Claimant, but Claimant's attorney refused to allow Ms. Seyler and Claimant to meet. According to Ms. Seyler, Claimant's attorney did not think an evaluation was appropriate at that time since Claimant was not at maximum medical improvement.

Although Ms. Seyler gets a more accurate evaluation when she is able to meet with the Claimant, in instances where she is not able to she conducts her evaluation based on the records available in the case, including depositions and medical records. In this case, Ms. Selyer reviewed the depositions of Claimant, Dr. Phelan and Dr. Murphy and the employment records of Employer.

Based on her investigation, Ms. Seyler found that Claimant had an eighth-grade education, was capable of reading newspapers and magazines, writing and making change. In the past, Claimant worked as a deckhand, a tugboat operator, a crane operator, a welder, a fitter and on a fish farm. Throughout this time Claimant also worked as a trawler on his own fishing boat.

According to Ms. Seyler's review of the medical records, she found that Dr. Murphy had recommended light to sedentary work for Claimant with lifting of no more than five pounds. Dr. Murphy also considered Claimant to be at maximum medical improvement. Dr. Phelan saw Claimant for neck pain and left upper extremity pain and thought Claimant could perform light to medium duty work with a pushing, pulling and lifting restriction of ten pounds. She also recommended an intermittent change of position. Dr. Phelan thought Claimant was capable of driving a car or a boat on inland waters.

Ms. Seyler conducted two labor market surveys (LMS) and identified jobs that she felt Claimant could perform based on his experience, education and physical capabilities. Her first LMS, dated February 22, 2006, considered an individual who was only able to lift, push or pull five to ten pounds. Ms. Seyler found the following jobs that she felt were appropriate for Claimant: 1) a meter reader (paid \$7.44 an hour), 2) a lens lab technician (paid \$7.00-\$7.50 an hour), 3) a driver position, in which the worker did not do the loading or unloading (paid \$8.50 an hour), 4) an unarmed security guard (paid \$10.09 an hour) and 5) an answering service position (paid \$6.50 an hour). All of these positions were located within the Golden-Meadow/Houma area.

Regarding the security guard position, Ms. Seyler explained that Claimant would not have to do any type of apprehensions. He would have to sign people in and out and make hourly rounds through some buildings and a parking lot.

Following this initial report, Ms. Seyler was provided with additional medical records from Dr. Sweeney and Dr. Miranne and the deposition of Dr. Smith. In light of this new information she conducted a follow-up LMS⁹ on May

⁹ This LMS included jobs that fit within the restrictions provided by Dr. Sweeney. Claimant's counsel objected to this report because he had not been furnished a copy of it, but Ms. Seyler was allowed to testify about it. Claimant's counsel then asked for an opportunity to get a copy of the second LMS to see if the jobs were available. Claimant was given 30 days to inquire into the jobs and respond by affidavit. For reasons best known to Claimant, Claimant himself made no inquiries as to these jobs, but rather attempted post-hearing to offer the opinion of a vocational rehabilitation expert which was denied by Order dated September 28, 2006.

30, 2006. Based on Dr. Sweeney's restrictions¹⁰, which expanded the range of jobs available for Claimant, Ms. Seyler found the following positions: 1) a welder with B&D Contracting (paid \$17 to \$20 an hour), 2) a welder-fitter position with Southern Fab that could accommodate a 35 pound lifting restriction (paid \$14 to \$15 an hour), 3) a jar technician with Weatherford International that would require occasional lifting of up to 50 pounds (paid \$8.50 an hour), 4) a driver position that would require lifting up to 40 pounds (paid \$6.50 an hour), 5) an assembler with International Marine (paid \$6.00 an hour), 6) a dental lab technician that could accommodate a 10 pound lifting restriction (paid \$6.00 an hour), 7) nightshift cashier supervisor who would be giving change to people playing video poker (paid \$7.00 an hour), 8) unarmed security guard position that would not require apprehension. All of these jobs were located within the Terrebonne Parish area and Ms. Seyler considered them all to be within Claimant's age, experience and educational level.

On cross-examination Ms Seyler stated that she had not gone back, since her initial report, to see if any of those jobs were still available as of the date of the trial. The report was conducted under her supervision and direction, but she did not contact the employers herself. She did not present any of these jobs to the doctors treating Claimant for their approval. No functional capacity evaluation was conducted on Claimant. While Ms. Seyler stated that an FCE would be helpful, she did not think it was necessary to conducting an evaluation.

Ms. Seyler was aware that Claimant was prescribed Fioricet, Lortab, Soma, Percocet and Lunesta; she was not aware that he was prescribed Elavil. She was also aware that Claimant had been prescribed Valium for a number of years prior to his February 2005 accident. Ms. Seyler knew the general affects of these drugs and did consider them when evaluating employers. She advised the potential employers that Claimant was on prescribed medication and the employers had no problem with this as long as Claimant could get the job done. Ms. Seyler also considered Dr. Phelan's opinion that Claimant could drive and operate a boat to be significant.

Medical Evidence

Medical Records from Lady of the Sea General Hospital (CX-6, EX-12)

June 6, 1990 - Claimant was taken to the emergency room at Lady of the Sea General Hospital as a result of a motor vehicle accident. Claimant complained of

¹⁰ Dr. Sweeney felt that Claimant was at MMI and restricted him from heavy or very heavy work.

pain to the back of his head and neck. An x-ray was performed on June 6, 1990 which revealed a normal cervical spine and no evidence of fracture to the cervical spine or to Claimant's left shoulder.

February 15, 2005 – X-rays of Claimant's chest and right shoulder were taken. The chest x-rays were normal and the right shoulder x-ray revealed minimal arthritic changes of the A/C joint. A clinical history of trauma was reported.

March 14, 2005 – Blunt head trauma was reported. X-rays of the cervical spine and skull were taken, both of which were normal.

March 31, 2005 – Hip pain was reported. An x-ray of the hip revealed a herniation pit within the proximal femur with normal variant. An MRI of the lumbar spine revealed no significant abnormalities to L1/2, a disc bulge at L2/3, a normal L3/4, a disc bulge at L4/5 and a disc bulge at L5/S1 which did not appear to cause any significant depression of the thecal sac. The doctor noted that the disc bulge at L2/3 may represent an area of prior trauma but appears to be chronic and that the disc bulge at L4/5 and L5/S1 are probably not clinically significant.

April 3, 2005 – Claimant went to the emergency room reporting left shoulder pain and stated that he had had a recent trauma at work. He was offered an injection, but refused treatment.

Medical Records of St. Anne General Hospital (CX-7, EX-14)

February 23, 2005 – Claimant went to the emergency room at St. Anne General Hospital and reported chest pain, right arm/shoulder pain and lumbar pain associated with a work accident on February 15, 2005. Claimant told the treating physician that he had been seen by the company doctor and that x-rays were taken and he was given naproxen, but it was not helping. The doctor noted a visible contusion on the right pectoral. Claimant was able to bend over, but it caused lumbar pain near his midline. X-rays were taken of the chest and spine. The chest was clear and the spine revealed degenerative changes but no fractures.

Medical Records of Dr. Troy Hutchinson (CX-15, EX-11)

Claimant saw Dr. Hutchinson on February 17, 2005 for rib/shoulder contusion. Dr. Hutchinson reviewed the x-rays taken at Lady of the Sea General Hospital, gave Claimant some pain medication and told him to return if his condition worsened.

Medical Records of Dr. John Sweeney (CX-12, EX-8)

Claimant saw Dr. Sweeney on February 21, 2005. Claimant stated that a week prior he was hit in the chest with a chain and complained of right sided chest wall pain and lower back pain. Dr. Sweeney noted that Claimant had a 6 cm healing bruise on his chest and was mildly tender to palpation. There were no signs of visible trauma to the lumbar region. Dr. Sweeney returned Claimant to regular duty with limited lifting or climbing for 4-5 days.

At the request of Employer, Dr. Sweeney, on March 21, 2006, provided a written "second medical opinion" regarding Claimant. Dr. Sweeney reviewed Claimant's medical history, medical records that were provided and performed a physical examination on Claimant. At the physical examination, Claimant reported having pain that he graded a 10/10 in his head, neck, upper back, mid back and lower back, as well as aching in both legs and pain into the left arm. Claimant stated that his pain was constant and did not exist prior to his accident. The physical exam revealed diminished range of motion (ROM) in Claimant's head and neck, very little motion on voluntary cervical spine movement and good ROM in his shoulders.

Dr. Sweeney concluded, based on his review of the records and examination of Claimant, that Claimant has cervical disc disease that would best be treated non-surgically. Claimant's headaches had been deemed non-cervicogenic and therefore, not likely to improve with surgery. Since Claimant's records indicated a plateauing of his subjective symptoms, Dr. Sweeney opined that Claimant had reached maximum medical improvement. Dr. Sweeney also agreed that Claimant was capable of employment, excluding heavy or very heavy work.¹¹

Deposition of Dr. Eddie Smith (CX-9)

Dr. Smith testified by deposition on March 6, 2006. Dr. Smith is a general and family practitioner. Claimant has been a patient of Dr. Smith's since 2001. Claimant first presented to Dr. Smith on June 21, 2001 complaining of chronic lower back pain and right leg pain. Claimant continued to see Dr. Smith regularly for his back pain. (From approximately June 21, 2001 until November 17, 2004 Claimant saw Dr. Smith every couple of months and consistently complained of back pain.) On June 13, 2002 Claimant complained of headaches. On April 3,

¹¹ Dr. Sweeney noted in his opinion that he was not able to review the actual MRI scan and his conclusion could be different upon reviewing the scan.

2003 Claimant returned to Dr. Smith complaining of pain on top of the shoulder and radiating towards the deltoids. Dr. Smith diagnosed Claimant as having right shoulder tendonitis. On October 28, 2003 Claimant again returned to Dr. Smith complaining of back pain and right thigh pain.

Following the accident, Claimant saw Dr. Smith on March 3, 2005 and reported that he had been in a work-related accident. Dr. Smith examined Claimant and noted no tenderness to his chest and good range of motion of the spine and extremities. He does not remember checking Claimant's head. At this time, Dr. Smith released Claimant to return to work full-duty. On March 29, 2005 Claimant returned to Dr. Smith and explained that he had attempted to go back to work on March 21, 2005, but that the next day he woke up with throbbing pain in his pelvis. Dr. Smith did not find anything objectively wrong with Claimant; however, because Claimant reported back pain and head pain, Dr. Smith took him off work. On April 6, 2005 Claimant returned to Smith's office complaining of severe left shoulder pain. Although Claimant was still experiencing back pain, his shoulder pain was the predominant problem. On April 28, 2005 Claimant returned with continuous pain in the left shoulder and neck. Dr. Smith reviewed Claimant's MRI report and noted a subligamentous herniation of C5-C6 intervertebral disc and some degenerative changes. At this time Dr. Smith felt Claimant had cervical facet arthritis/arthrosis and placed Claimant on percocet. Claimant continued to return to Dr. Smith with complaints of shoulder and neck pain. On June 28, 2005 Claimant began complaining of headaches. Dr. Smith testified that he did not recall any event precipitating the headaches and noted that headaches could be a side effect of the medication Claimant was taking.

On August 5, 2005 Dr. Smith again examined Claimant. According to Dr. Smith's notes from this day Claimant stated that he fell back and hit his back and left shoulder and complained of bruising behind his right ear. Dr. Smith stated that Claimant was referring to a new accident, not the February 15, 2005 accident. Dr. Smith found soft tissue swelling and bruising on Claimant's back and right elbow, skin lacerations on Claimant's lower back and bruising behind his right ear and to his right eye. Dr. Smith recommended that Claimant be seen by a neurologist. On October 5, 2005 Claimant returned to Dr. Smith for a follow-up visit. He still complained of neck pain, back pain and headaches; however, Dr. Smith testified that the condition had stabilized at this point. Dr. Smith began seeing Claimant about every two weeks to monitor his medication.¹² Dr. Smith is still treating Claimant for pain management.

¹² Claimant had apparently taken too much soma and had to go to the hospital. After this incident, Dr. Smith took Claimant off the soma and only prescribed percocet.

Dr. Smith testified that on January 3, 2006 Claimant reported that he exacerbated his condition when he moved some Christmas objects. On February 1, 2006 Claimant was again seen by Dr. Smith and had recently been in an automobile accident. Claimant stated that his neck pain was worse. On February 6, 2006 Claimant was still suffering from increased back and neck pain following the accident and Dr. Smith ordered x-rays and put Claimant back on a lower dose of soma. On February 23, 2006 Claimant returned with continued complaints of neck pain that was increased by driving to New Orleans to meet with his attorney. Prior to the January 2006 automobile accident, Claimant had never complained that driving exacerbated his neck pain.

Dr. Smith reiterated that Claimant only reported one incident of a headache prior to his February 15, 2005 accident. Following the accident, Claimant did report that his back pain increased. Dr. Smith was asked to determine to a reasonable medical certainty whether the MRI results of April 2005 could be related to the February 15, 2005 accident. Dr. Smith stated that with regard to the lumbar region, some of the findings were chronic, but that the L2-L3 posterior disc bulge could be associated with radicular symptoms that Claimant did not have prior to the accident. In the neck, Dr. Smith opined that the herniation of the C5-C6 could be associated with the accident, but that the cervical facet arthrosis was probably a chronic degenerative condition. Dr. Smith noted that he would defer to Dr. Murphy's (an orthopedic) opinion regarding orthopedic conditions that he was treating Claimant for. At the time of deposition Dr. Smith did not think Claimant could return to work. Nor did he think Claimant was capable of returning to work prior to the January 2006 motor vehicle accident.

Deposition of Dr. Charles Murphy (CX-10)

Dr. Charles Murphy, an orthopedic surgeon, testified by deposition on February 14, 2006. Dr. Murphy first examined Claimant on April 19, 2005. Claimant relayed the events of the February 15, 2005 accident to Dr. Murphy and explained about his medical care since that time. Claimant explained that initially, following the accident, he felt his condition was improving and he tried to return to work. However, while at work he was sore and in pain and developed severe worsening of the pain in his neck and left shoulder. Claimant also reported pain that traveled into his left upper arm and occasional headaches. Dr. Murphy stated that Claimant's complaints all seemed to stem from his cervical spine. For example, the pain in his shoulder was not from rotation of the shoulder, but from range of motion with the cervical spine. X-rays of the cervical spine were taken

and revealed changes of the anterior endplate of the C-6 vertebral bodies – this appeared to be more of a chronic change than an acute avulsion injury. Dr. Murphy testified that Claimant's description of the February 15, 2005 accident was consistent with a resulting cervical sprain injury and a symptomatic worsening on April 21, 2005 with development of progressive neck pain and left-sided radicular pain. Dr. Murphy stated that the radicular pain was probably diskogenic in origin and it was debatable as to how much it was affected by the injury of February 15, 2005 and the return to work on April 21, 2005. Dr. Murphy also explained that often patients will have strictly neck pain that changes into a radicular pain pattern. Claimant also tested positive for nerve root impingement based on the Spurling's Test. Dr. Murphy prescribed some medication and recommended an MRI scan of the cervical spine. At this time, Dr. Murphy restricted Claimant from working as a pipefitter or welder, but did think Claimant could do light or sedentary work with no lifting over five pounds.

An MRI was conducted and showed multi-level abnormalities in the cervical spine including disc herniation and disc bulging.¹³ On April 25, 2005 Dr. Murphy recommended that Claimant start physical therapy, make an appointment with Dr. Amy Phelan for possible spinal injections, and have a neurosurgical consult with Dr. Lucien Miranne. Claimant was treated by Dr. Phelan, and upon return to Dr. Murphy on February 8, 2006, Claimant indicated he was ready to have the surgery consult with Dr. Miranne. Dr. Murphy deferred to Dr. Miranne's opinion regarding whether or not Claimant needed surgery.

Dr. Murphy stated that Claimant's return to work on March 21, 2005 was probably a worsening or symptomatic aggravation of the first event. Dr. Murphy opined that he believes Claimant needs to have the evaluation by Dr. Miranne or any other neurosurgeon so they can explain the risks, benefits and limitations of surgery. If Claimant decided to not have the surgery, then Dr. Murphy would at that time place him at MMI. However, even if Claimant were at MMI, Dr. Murphy would not consider Claimant capable of returning to work as a welder or fitter and would suggest an FCE and some type of vocational rehabilitation as well as a return visit to either Dr. Murphy or whoever Claimant's treating physician was in order to establish Claimant's work restrictions.

¹³ On cross-examination, Dr. Murphy stated that the condition portrayed on the MRI was a preexisting degenerative type change that was present prior to the February 15, 2005 accident. Dr. Murphy also stated that it would be possible for Claimant to have that condition and not experience any symptoms from it.

Deposition of Dr. Amy Phelan (CX-11)

Dr. Phelan, a specialist in physical medicine and rehabilitation, testified by deposition on February 9, 2006. Dr. Murphy referred Claimant to Dr. Phelan who first examined Claimant on May 3, 2005 for neck and left arm pain. Dr. Phelan found that Claimant suffered from neck pain with left upper extremity pain, cervical disk herniation and a question of cervical radiculopathy. She found Claimant's symptoms to be consistent with the medical history he provided her regarding a work-related accident and subsequent work-related aggravation. Dr. Phelan reviewed the MRIs taken of Claimant and concurred with the radiologist's finding. Dr. Phelan recommended an EMG/nerve conduction study be done to test for nerve impingement and radiculopathy. She also suggested cervical facet injections as an initial intervention. These injections were performed on Claimant on June 23, 2005. At first, the injections were successful and at a follow up visit on July 5, 2005 Claimant reported decreased pain; however, he also reported the onset of global headaches approximately three days to one week after the injections. Dr. Phelan stated that headaches are not a normal side-effect of this procedure. Claimant returned on July 25, 2005 and again complained of headaches although his neck and arm pain seemed somewhat improved.

On August 17, 2005, with Claimant's headaches persisting, Dr. Phelan referred him for an MRI of the brain.¹⁴ Dr. Phelan thought a sinus infection might be causing Claimant's headaches and gave him antibiotics. This did not improve Claimant's condition. Dr. Phelan then recommended a neurology evaluation and Claimant made an appointment with Dr. D'Souza. Dr. Phelan did not feel that Claimant's headaches were cervicogenic in origin. She stated that cervicogenic headaches can be caused by pain radiating from the C1-C2 joints, but Claimant's MRI did not show any abnormalities at that level. Dr. Phelan also did nerve blocks at the C1-C2 level and this did not provide any relief for Claimant. Dr. Phelan would not necessarily relate Claimant's headaches to his February 2005 accident because he did not complain of headaches following the accident.

On January 26, 2006 Claimant returned to Dr. Phelan complaining of increased left-sided neck pain similar to before, but not radiating into his arm as well as headaches. Dr. Phelan noted that Claimant did have a restricted cervical range of motion, but that his symptoms were not as severe as before because his pain did not radiate into the arm. Dr. Phelan suggested repeating the cervical facet injections and deferred to Dr. D'Souza regarding the headaches.

¹⁴ She noted that cervical facet pain may radiate to the top of the head.

Dr. Phelan placed Claimant on light-duty work restrictions with no lifting, pushing or pulling greater than 10 pounds and allowed intermittent change of position. Although she acknowledged that Claimant might potentially be able to do medium duty work, it was too soon to determine his work status because he was still under active treatment. She did not place Claimant at MMI.

Medical Records of Dr. Lucien Miranne (CX-13)

Dr. Miranne examined Claimant on March 31, 2006. He noted that Claimant's cervical spine was restricted in flexion and extension and lateral rotation. On range of motion there was diffuse cervical tenderness and there was a positive Spurling's test. Dr. Miranne diagnosed Claimant with cervical radiculopathy, intractable. He recommended that Claimant have a high resolution 3-Tesla MRI scan of the cervical spine and a cervical spine series with flexion and extension views. Dr. Miranne gave Claimant a prescription and wanted to see him back to discuss potential surgical options. Dr. Miranne also noted that if Claimant had hematology problems, as stated, then he would need to have that evaluated prior to any surgery.

Medical Records of Dr. Terrence D'Souza (CX-21)

On November 7, 2005 Claimant saw Dr. D'Souza regarding his headaches. Dr. D'Souza diagnosed Claimant with postconcussional headaches of which the cervical spine disease may be a contributing factor. Claimant's neurological exam was otherwise normal. An EEG was performed on Claimant on December 15, 2005 which was normal.

The deposition of Dr. D'Souza was taken post-hearing and submitted as Claimant's Exhibit 31. He is a board certified neurologist who first saw Claimant on November 7, 2005, at the referral of Dr. Phelan for evaluation of headaches and neck pain. Documented by an MRI, Dr. D'Souza diagnosed a post-concussive syndrome with headaches in addition to the cervical spine disease that contributed to Claimant's headaches. Based on the description provided by Claimant, Dr. D'Souza opined that the post-concussive headaches were related to Claimant's work accident. Pain medication was then prescribed.

Dr. D'Souza saw Claimant again on July 14, 2006, with continued complaints of headaches being about the same. An EMG was performed on July 24, 2006, which showed chronic pathology at C5-6-7 which could also be caused by the cervical condition related to Claimant's work accident. These results were

reviewed by Claimant on September 18, 2006, and Dr. D'Souza suggested Claimant see a neurosurgeon, Dr. Miranne, for possible surgical intervention or nerve blocks. It was Dr. D'Souza's belief proper treatment of Claimant's C-5-7 nerve roots would improve his headaches.

On cross-examination, Dr. D'Souza acknowledged he was not aware that Claimant was involved in an automobile accident in January 2006. If it involved a "whiplash" type injury, Dr. D'Souza thought it would have exacerbated Claimant's symptoms. Likewise, if Claimant injured his shoulder in such an accident, he thought too it would increase Claimant's pain on that side. Basically, however, he found Claimant's symptoms to have remained the same since his first examination in November of 2005, and he placed Claimant at maximum medical improvement at that time and thought he could do sedentary type work with restrictions. As to the restrictions, Dr. D'Souza felt Claimant should not lift over 20 lbs over his shoulder and do any activity that involves stretching of the neck and no lifting over 20 lbs.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Greenwich Collieries (Maher Terminals)*, 512 U.S. 267, 28 BRBS 43 (1994), that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the Claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

Causation

Section 20(a) of the Act provides a Claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm, and that employment conditions existed which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*,

25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984).

Once the Claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903; *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the Section 20(a) presumption is rebutted and disappears, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant testified that on February 15, 2005 he was injured when a chain tongue struck him in the chest. Claimant advised Employer of the injury on the same day. Both Employer's counsel and Claimant's counsel have stipulated that Claimant was injured on February 15, 2005 in the course and scope of employment and that the injury was reported that same day. (JX 1, Tr. 118, 126.)

Based on the facts and the party's stipulation, I find that Claimant has established a prima facie case of compensability with regard to the injury he suffered on February 15, 2005 in that he has established that he suffered a harm and that working conditions existed which could have caused the harm.

No evidence was offered to rebut this presumption. Thus, based on the facts and stipulations of the parties I find that Claimant's injuries are ones arising out of or in the course of his employment.

Specifically, as a result of his work accident and his later one day attempt to return to work, Claimant suffered injuries to his cervical spine with radiculopathy to his left shoulder and headaches. The opinions of Drs. Smith, Murphy, Phelan and D'Souza support such a finding, and Employer/Carrier has offered no medical evidence to rebut the cause of these injuries. Dr. Smith was the only physician to minimize Claimant's condition, and the remainder who have seen him felt that the injuries from which he now suffers were a result of his work accident.

While Dr. Phelan, who had provided Claimant with injections, was uncertain as to the origin of Claimant's headaches, Dr. D'Souza's opinion as a board certified neurologist put that issue to rest by testifying that Claimant's headaches were related to his work accident.

Likewise, the motor vehicle accident which Claimant had in January of 2006, despite Employer/Carrier's suggestion, was not a supervening cause that contributed to Claimant's work injuries. Dr. D'Souza examined Claimant in November 2005 and July 2006 and found his condition the same. The automobile accident only involved Claimant's knees and hips and did not involve his cervical injury.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1985). A Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a Claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *La. Ins. Guaranty Ass'n v. Abott*, 40 F.3d 122, 29 BRBS 22 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979).

In the present case, the parties dispute whether Claimant has reached MMI. Claimant argues that he has not yet reached MMI as Dr. Murphy, his treating physician, referred him to Dr. Miranne for a surgical consult. Dr. Miranne opined that Claimant might be a surgical candidate; however, he wanted additional diagnostic testing done before he made a final recommendation. This additional testing has not yet been completed. Therefore, until Dr. Miranne can make a recommendation either for or against surgery, Claimant argues that MMI has not been reached.

Employer argues that according to Dr. Sweeney, Claimant has reached MMI. Dr. Sweeney does not consider Claimant to be a surgical candidate and does not think that Claimant's headaches are related to a cervical spine injury or condition. According to Dr. Sweeney, Claimant's records indicate a plateauing of his subjective symptoms; therefore, Dr. Sweeney believes Claimant to be at MMI. However, Dr. Sweeney has seen Claimant only on two occasions at the request of Employer/Carrier, and I am more inclined to accept the opinion of Dr. Murphy, Claimant's primary treating orthopedic, that Claimant is at MMI only should surgical intervention not be an alternative. Consequently, because treatment to date has not freed Claimant of his symptoms related to his cervical injury, I find until Dr. Miranne determines whether Claimant is a candidate for surgery, Claimant has not reached maximum medical improvement within the meaning of the law.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A Claimant who shows he is unable to return to his former employment due to his work related injury establishes a *prima facie* case of disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 420, 24 BRBS 116 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a Claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. Gen. dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 24 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability, whether temporary or permanent, as a result of his accident.

In the present case, no physician (including Dr. Sweeney) suggests Claimant can return to his previous employment as a welder. None of the physicians that treated or evaluated Claimant indicated that he could return to his former employment. While both Dr. Murphy and Dr. Phelan did agree that Claimant could return to some type of light employment, they placed limiting physical restrictions on Claimant. Therefore, Claimant has established a *prima facie* case of

disability and the burden shifts to Employer to show the existence of suitable alternative employment.

To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the claimant's geographical area which he is capable of performing, considering his age, education, work experience and physical restrictions, for which the claimant is able to compete and could likely secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981).

Turner does not require that the employer find specific jobs for the claimant or act as an employment agency for the claimant; rather, the employer may simply demonstrate the availability of general job openings in certain fields in the surrounding community. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992). However, for job opportunities to be realistic, the employer must establish the precise nature and terms of job opportunities which it contends constitute suitable alternative employment. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, 103 (1985). Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. *P & M Crane Co.*, 930 F.2d at 430.

In this case, Employer/Carrier has offered numerous jobs from two labor market surveys (LMS), ranging from light to medium duty work, that they contend are suitable alternative employment for Claimant. Specifically, in her job survey of February 22, 2006, Ms. Seyler identified five jobs which took into consideration Claimant's sedentary restrictions. While not allowed by his lawyer to interview Claimant, Ms. Seyler reviewed medical records, depositions and investigated Claimant's work history to conclude the suitability of these jobs. Claimant, however, apparently did nothing in the way of pursuing these jobs except to file a

tardy post-hearing affidavit that “he has investigated and learned ... with the help of others versed in the area of expertise” that none of these jobs are suitable.¹⁵

Claimant was aware of Ms. Seyler’s February 22, 2006, job survey well before the hearing. Despite that fact Claimant did nothing to ascertain his real prospects of obtaining any one of these positions. Rather, Claimant waited to reply to the survey until post-hearing when he attempted to use, through his affidavit, the opinion of an expert whose opinion was denied by Order dated September 28, 2006. In other words, Claimant has exhibited no diligence in regard to these positions, at least some of which clearly fall within the restrictions placed upon Claimant by Drs. Murphy and Phelan.

Consequently, based on the opinions of Claimant’s treating physicians that he can perform sedentary work and based on Ms. Seyler’s opinion that the Claimant is capable of competing for and performing the jobs she identified on February 22, 2006, it is my finding that at the least Claimant is capable of earning a minimum of \$6.50 per hour with the answering service, and probably more as a lens lab technician. Therefore, since the identifications of these jobs on February 22, 2006, I find Claimant to be temporary partially disable with an earning capacity of at least \$6.50 per hour. In making these findings I am aware that Claimant failed in his attempt to return to his previous welding position and in operating his trawler, but neither of these attempts bely the fact that, as the doctors have found, Claimant still remains capable of at least sedentary employment. Also, contrary to his contention that he speaks with an accent, I did not find him to be unintelligible, nor is there any medical evidence to suggest that the medication that he is taking would impair him from performing the tasks required of the answering service position.

Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990).

¹⁵ For the reasons provided in my Order of September 28, 2006, I will not admit Claimant’s post-trial affidavit (CX 32) because not only was it untimely filed but it is based on the opinions of Dr. Stokes whose report was previously disallowed.

Sections 10(a) and 10(b) apply to an employee working full-time in the employment in which he was injured. *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), *rev'd* 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.) *cert. denied*, 469 U.S. 818 (1984). Section 10(a) applies if the employee worked “substantially the whole of the year” preceding the injury, which refers to the nature of the employment not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Eleazer v. General Dynamics Corp.*, 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady then Section 10 (a) should apply. *Duncan v. Washington Metropolitan Area Transit*, 24 BRBS 133 (1990) (holding that 34.5 weeks of work was “substantially the whole year”, where the work was characterized as “full time”, “steady” and “regular”) . The number of weeks worked should be considered in tandem with the nature of the work when deciding whether the Claimant worked substantially the whole year. *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153-156 (1979).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for substantially the whole year. 33 U.S.C. § 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). This would be the case where the Claimant had recently been hired after having been unemployed. Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in the same or similar employment, in the same or neighboring place. Accordingly, the record must contain evidence of the substitute employee's wages. *See Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

Section (c) is a catch-all to be used in instances when neither (a) nor (b) are reasonably and fairly applicable. If employee's work is inherently discontinuous or intermittent, his average weekly wage for purposes of compensation award under Longshore and Harbor Workers' Compensation Act (LHWCA) is determined by considering his previous earnings in employment in which he was working at the time of injury, reasonable value of services of other employees in same or most similar employment, or other employment of employee, including reasonable value of services of employee if engaged in self-employment. Longshore and Harbor Workers' Compensation Act, §§ 10(c), 33 U.S.C.A. §§ 910(c). *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028 (5th Cir. 1997)

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). *Hayes v. P & M Crane Co., supra*; *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. *See Story v. Navy Exch. Serv. Center*, 33 BRBS 111(1999).

In this case, neither 10(a) nor 10(b) are applicable to my calculation of average weekly wage. Claimant had not been working for Employer for substantially the whole of the year preceding his injury. Nor is there any evidence of co-worker's salaries with which to compare Claimant. Therefore, since 10(a) and 10(b) do not apply, 10(c) is the appropriate method for calculating Claimant's average weekly wage.

The object of 10(c) is to arrive at a sum which reasonably represents the Claimant's annual earning capacity at the time of his injury. *See Story*, 33 BRBS 111. Therefore, I adopt Claimant's assertion that a fair and accurate estimate of Claimant's annual earning capacity at the time of his injury can be calculated by focusing on the weeks that Claimant worked for Employer prior to his injury.

Claimant suggests that I look at his earnings from January 3, 2005 through February 13, 2005 (CX-4) to determine his wage earning capacity. Claimant, however, began working for Employer on November 15, 2004 (Tr. 28) and worked consistently until his injury on February 15, 2005. It appears that Claimant is avoiding the earnings from November and December 2004 (EX-29) because they involved holidays during when less work was available than during non-holiday season. Leaving this time period out, however, does not accurately reflect Claimant's wage earning capacity because historically this time of year is slow and Claimant has always had less work. Claimant testified that although he was available for work during this time period, the Superintendents were often on vacation so he could not go into work. Claimant had worked in the Bollinger shipyard for about three years and stated that every year this was the same. (Tr. 29) Therefore, an accurate reflection of Claimant's wage earning capacity at the time of his injury includes an analysis of his entire earnings during his employment with Employer.

Claimant worked for Employer from November 15, 2004 (Tr. 28) through February 15, 2005. (CX-4, CX-29) During these thirteen weeks Claimant earned \$6,880.94 (CX-4, CX-29), which equals an average of \$539.30, and it is this figure

I adopt as a reasonable representation of Claimant's average weekly wage at the time of his injury.

Medicals

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A Claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). The Claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atl. Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding Div., Litton Sys.*, 15 BRBS 299 (1983); *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996). If an employer has no knowledge of the injury, it cannot be said to have neglected to provide treatment, and the employee therefore is not entitled to reimbursement for any money spent before notifying the employer. *McQuillen*, 16 BRBS 10.

Section 7(c)(2) of the Act provides that when the employer or carrier learns of its employee's injury, it must authorize medical treatment by the employee's chosen physician. Once a Claimant has made his initial, free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier, or District Director. See 33 U.S.C. § 907(c); 20 C.F.R. § 702.406. The employer is ordinarily not responsible for the payment of medical benefits if a Claimant fails to obtain the required authorization. *Slattery Assocs. V. Lloyd*, 725 F.2d 780, 787, 16 BRBS 44, 53 (D.C. Cir. 1984); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 664 (1982). Failure to obtain authorization for a change can be excused, however, where the Claimant has been effectively refused

further medical treatment. *Lloyd*, 725 F.2d at 787, 16 BRBS at 53; *Swain*, 14 BRBS at 664.

In this instance, Claimant, at Employer's direction, went to Drs. Sweeney and Blanchard. When the Employer/Carrier refused to pay for a return visit to Dr. Blanchard, Claimant went to his family physician, Dr. Smith. Realizing Claimant's condition needed the experience of a specialist, Dr. Smith recommended an orthopedist and Claimant chose Dr. Murphy. Dr. Murphy determined Claimant had two options, pain management through injections or surgery. As a first choice, Dr. Murphy referred Claimant to Dr. Phelan for injections, but when that brought no success Claimant was then referred to a neurosurgeon, Dr. Miranne, as well as a neurologist, Dr. D'Souza. All of this treatment appears reasonable and necessary and stemming from the recommendations of Claimant's choice of physicians, Drs. Smith and Murphy. Why Employer/Carrier has refused the obligation is curious.

Finally, as to medications prescribed by the aforementioned physicians, I find the same to be the Section 7 obligation of Employer/Carrier. As to mileage for medical treatment, Employer/Carrier noted in their post-trial brief they do not contest reimbursement for any mileage charges.

Section 14(e) penalties

Under Section 14(e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days after it has knowledge of the injury. 33 U.S.C. §914; *Jaros v. Nat'l Steel Shipbuilding Co.*, 21 BRBS 26, 32 (1988). In this instance Employer controverted on May 4, 2005. (JX 1) Employer's counsel stipulated that Employer was advised of Claimant's injury on February 15, 2005. (JX 1) Therefore, Employer did not file a notice of controversion within 14 days of learning of Claimant's injury; however, Employer began paying compensation on February 17, 2005 (EX-2).¹⁶ Therefore, Employer is not liable for Section 14(e) penalties.

¹⁶ Although Claimant contends that payment of benefits was intermittent, CX-23 indicates that Employer paid Claimant through about the end of April 2005, then stopped payments and then resumed payments again in March 2006. While it appears Employer stopped payments sometime toward the end of April or beginning of May 2005, they controverted on May 4, 2005; therefore, no penalties are owed.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from February 15, 2005 until February 22, 2006 based on an average weekly wage of \$539.30;

(2) Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from February 22, 2006 and continuing based on the difference between Claimant's average weekly wage of \$539.30 and his wage earning capacity of \$260.00 per week;

(3) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary past and future medical expenses resulting from Claimant's injuries (cervical spine, left shoulder and headaches) of February 15, 2005;

(4) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(5) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

(6) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response; and

(7) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 19th day of October, 2006, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge